August 13, 2018

Mr. Michael McDavit
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

Ms. Stacey Jensen
Regulatory Community of Practice
(CECW-CO-R)
U.S. Army Corps of Engineers
441 G Street N.W.
Washington, D.C. 20134

AMERICAN PUBLIC POWER ASSOCIATION
Powering Strong Communities

www.PublicPower.org
#PublicPower

2451 Crystal Drive
Suite 1000
Arlington, VA 22202-4804

202-467-2900

Submitted electronically via www.regulations.gov

RE: Comments on the American Public Power Association on the, Definition of "Waters of the United States" Re-codification of the Pre-Existing Rule; EPA-HQ-OW-2017-0203; FRL-9980-52-OW (83 Fed. Reg. 32,227 (July 12, 2018))

Mr. McDavit and Ms. Jensen:

The American Public Power Association (APPA or Association) appreciated the opportunity to file comments with the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (together, Agencies) on the proposal to repeal the 2015 "Waters of the United States" Rule (2015 Rule), and recodify the regulatory text defining "waters of the United States" (WOTUS) that was in place prior to the 2015 Rule (Proposal).[1] The Agencies, supplemental notice of proposed rulemaking (SNPRM) provides additional rational and explanation to support the Proposal and seeks comments on a number of important issues relevant to the Proposal.[2] The Association's comments on the Proposal are incorporated by reference.[3] The Association provides these additional comments in response to the SNPRM and in light of the litigation and regulatory developments since September 2017, which further supports the repeal of the 2015 Rule.

The Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the

[1] "Definition of 'Waters of the United States' – Recodification of Pre-Existing Rules; 82 Fed. Reg. 34,899 (July 27, 2017.
[2] 83 Fed. Reg. 32,227 (July 12, 2018).
[3] APPA comments on EPA's and Coprs' Proposed Repeal 2015 Clean Water Rule and Recodification of Pre-Existing Rules (September 27, 2017, Doc. No. EPA-HQ-OW-2017-0203-11677 (APPA Repeal Comments).

more than 49 million people that public power utilities serve, and the 93,000 people they employ. The Association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.

Many Association members provide essential water, wastewater, and at times storm water control services to their customers. Public power supports, the goals of the Clean Water Act (CWA or Act). Of importance to Association members subject to regulation under the CWA, is the regulatory uncertainty that flows from the final 2015 Rule's lack of clarity regarding key terms and definitions such as: adjacency, other waters, significant nexus, tributaries, floodplain, and certain exclusions.[4]

The Association supports repealing the 2015 Rule because it reaches land and waters well beyond the Agencies' statutory authority, ignores important limits recognized by the Supreme Court, fails to preserve the States' authority to regulate non-navigable waters, and fails to provide needed clarity and certainty for both regulators and the regulated community. Repealing the 2015 Rule and decodifying the pre-existing regulations would return to the Code of Federal Regulations the regulations that existed prior to the 2015 Rule and would reflect the decisions by the U.S. District Courts for the Southern District of Georgia and the District of North Dakota to enjoin the 2015 Rule in 24 states.[5] While the 2015 Rule will not be applicable until February 6, 2020, the Association encourages the Agencies to move expeditiously to repeal the 2015 Rule and recodify the pre-existing regulations to ensure consistency and regulatory certainty.[6]

A repeal of the 2015 Rule and recodification of the prior regulatory text is necessary in the near term; however, the Association supports a separate Step 2 rulemaking to propose a new definition of WOTUS. We encourage the Agencies to undertake a subsequent rulemaking on the appropriate geographic scope of WOTUS because there are many issues with the pre-existing regulations and guidance that needs to be addressed. Any Step 2 rulemaking to define WOTUS should be consistent with the statute, case law and the principles of cooperative federalism.

Regulatory and Litigation Developments Since September 2017 Support the Repeal of the 2015 Rule

Since the Proposal, the U.S. Court of Appeals for the Sixth Circuit's (Sixth Circuit) nationwide stay of the 2015 Rule has been lifted in response to the Supreme Court's decision that the 2015 Rule is

[4] 80 Fed. Reg. 37,054 (June 29, 2015).
[5] *Georgia v. Pruitt*, No. 2:15-cv-00079, 2018 WL 2766877 (S.D. Ga. June 8, 2018) ("*Georgia*"); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).
[6] 83 Fed. Reg. 5,200 (Feb. 6, 2018).

subject to direct review in the district courts.[7] Thus, district court litigation has resumed and the Southern District of Georgia issued an order on June 8 enjoining the 2015 Rule in an additional eleven states. Currently the 2015 Rule is stayed in 24 states, and two additional district courts are considering motions for preliminary injunction.[8,9]

After the Agencies issued the Proposal, they proposed and finalized a rule adding an applicability date of February 6, 2020, to the 2015 Rule.[10] The Applicability Rule delays implementation of the 2015 Rule for two years to "maintain the status quo" and [provide] continuity and regulatory certainty to regulated entities, while the Agencies seeks to ensure the scope of CWA jurisdiction remains consistent nationwide. In the interim the Agencies continue to apply the prior regulatory regime, consistent with the Sixth Circuit stay of the 2015 WOTUS rule. After the Applicability Rule was promulgated, multiple states and environmental groups challenged the Applicability Rule is district courts, raising procedural and substantive concerns.[11] While, no court has ruled on the merits of the challengers' claims, a decision finding the Applicability Rule unlawful could result in the 2015 Rule going into effect in other states (not subject to court stay and where others have prevailed on their challenges to the Applicability Rule). A patchwork of rules would be disruptive, including to critical energy infrastructure projects undertaken by public power utilities. All the courts to review the merits of the 2015 Rule to date have found it unlawful for a multitude of reasons and enjoined the 2015 rule to avoid the significant concerns that would result from implementation. These decisions support the Agencies' proposed repeal.

The 2015 Rule Exceeds the Agencies' Authority Under the CWA and Should be Repealed

The CWA is grounded in federalism. Congress granted EPA and the Corps very specific, limited powers to regulate "navigable waters," defined as "the waters of the United States."[12] Congress recognized and sought to preserve the States' traditional and primary authority over land and water use.[13] Consistent with Congress's objectives, any "waters of the United States" definition should preserve the States' traditional and primary authority over land and water use and provide clarity sufficient to allow States to identify which waters are and are not subject to federal CWA regulation.

---

[7] Nat'l Ass'n of Mfrs. v Dep't of Def., 138 S. Ct.671 (2018); in re Dep't of Def. & EPA Rule, 713 Fed. App'x 489 (6th Cir. 2018).
[8] Texas v. EPA; No. 3:15cv-162 (S.D. Tex.); Am. Fm Bureau Fed'n et al. v. EPA and; Ohio v. EPA, NO 2:15-cv-02467 (S.D. Ohio).
[9] Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West, Virginia, and Wisconsin.
[10] 83 Fed. Reg. 5,200 (February 6, 2018).
[11] 83 Fed. Reg. 32,230.
[12] 33 U.S.C. § 1362(7).
[13] 33 U.S.C. § 1251(b).

In line with the CWA's statutory objectives, the Supreme Court has recognized important limits on CWA geographic jurisdiction. When Congress enacted the CWA, it intended to exercise its traditional "commerce power over navigation," and "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[14,15] But the Supreme Court emphasized that Congress's use of the term "navigable waters" reflects a fundamental limit on the Agencies' permitting authority, and the term "navigable" has at least some import and must be given effect.[16,17] In contrast with these principles, the 2015 Rule ignores and misinterprets the statutory and constitutional limits recognized by the Supreme Court, reads the term "navigable" out of the statute, and adopts an overly expansive view of federal CWA authority. Thus, the Agencies should repeal the 2015 Rule.

The 2015 Rule's Scientific Literature Review

EPA's Office of Research and Development developed a report, summarizing certain publications regarding the presence of connections among aquatic resources, entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (Connectivity Report).[18] The Connectivity Report was reviewed by EPA's Science Advisory Board (SAB) for technical accuracy of the Report's findings that streams and most wetlands are connected to downstream waters. As EPA notes in the SNPRM, "the 2015 Rule relied on a scientific literature review- the Connectivity Report -to support exerting federal jurisdiction over certain waters…" and the report notes that connectivity "occur[s] on a continuum or gradient from highly connected to highly isolated,"[19] SAB further noted the report is a science, not a policy document. "Previously the [Agencies] placed too much emphasis on information and conclusions of the Connectivity Report when setting jurisdictional lines in the 2015 Rule, relying on [the Report's] environmental conclusions in place of interpreting the statutory text and other indicia of Congressional intent…"[20] In the 2015 Rule the Agencies mischaracterized the findings of the Connectivity Report and the extent to which the Report dictated a particular result. For example, the final Connectivity Report did not evaluate the importance of connections between small streams, nontidal wetlands, and open waters on larger navigable waters. The Report noted that "the research community has not reached a consensus regarding the best methods or metrics to quantify or predict hydrologic or

[14] SWANCC, 531 U.S. at 168 n.3.
[15] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (emphasis added); SWANCC, 531 U.S. at 171-72.
[16] SWANCC, 531 U.S. at 171 (citing Riverside Bayview, 474 U.S. at 138).
[17] SWANCC, 531 U.S. at 172.
[18] U.S. EPA. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, EPA/600/R-14/475F (Jan. 2015).
[19] 83 Fed. Reg. 32,241.
[20] 83 Fed. Reg. 32,241

chemical connectivity."[21] Accordingly, the Agencies concluded in the preamble to the 2015 Rule that "the science does not provide bright line boundaries" for distinguishing "the waters of the United States" from the waters of the states.[22] Indeed, "[s]ignificant nexus is not purely a scientific determination." Thus, the Connectivity Report did not answer the many policy and legal questions that arise when defining the outer bounds of the scope of the CWA; nor did it provide bright line boundaries.

The Agencies Should Recodify the Prior Regulation and Rescind the 2015 Rule

The Agencies are currently implementing those prior regulation, as informed by guidance documents and consistent with *SWANCC* and *Rapanos*, applicable case law and longstanding agency practice.[23] The Association supports the Agencies Proposal to rescind the 2015 Rule, to recodify the regulations that were in effect immediately before the effective date of the 2015 Rule and to conduct a notice and comment rulemaking to reevaluated the WOTUS definition. The SNPRM seeks additional input on whether to rescind the 2015 Rule or adopt alternative approaches or revise implementation guidance.[24] The 2015 Rule is flawed; therefore, it is necessary to permanently withdraw the 2015 Rule. There are no viable alternative approaches. If the Agencies were to simply repeal the 2015 Rule without recodifying the prior regulations, there would be no definition. Regulated entities and the Agencies would then have to apply the CWA on a case-by-case basis, resulting in inconsistent implementation, until a substantive rulemaking is complete. There is agreement amongst industry, states, government and the Supreme Court that a rulemaking is needed to provide certainty as to the geographic scope of the Agencies authority.

[21] *See* Connectivity Report at 2-49 to 2-50
[22] Br. for Resp'ts, In re EPA, 803 F.3d 804, No. 15-3751, at 136 (6th Cir. Jan. 13, 2017) (citing 80 Fed. Reg. at 37,060).
[23] Proposal, 82 Fed. Reg. 34,902.
[24] 83 Fed. Reg. 32,249.

Conclusion

The Association supports the Agencies' intent to undertake a future rulemaking to clearly articulate CWA authority along federal-state lines and provide clarity and certainty on the scope of WOTUS. A new WOTUs rule should embrace the full history of the Supreme Court's review of the scope of WOTUS. The Association encourages the Agencies to expeditiously propose a new definition consistence with these principles. Please contact Ms. Carolyn Slaughter, cslaughter@publicpower.org (202) 957-8997 with any questions regarding these comments.

Sincerely,

Carolyn Slaughter
Director, Environmental Policy
American Public Power Association